

-----Original Message-----

From: Clauson, Karen L
Sent: Wednesday, September 17, 2003 12:03 PM
To: Wagner, Kim K , Goldberg, Tobe L
Subject: FW: Pending matters against Qwest

-----Original Message-----

From: Clauson, Karen L
Sent: Tuesday, September 16, 2003 9:47 AM
To: 'Jodi Smith@usdoj.gov'
Subject: Pending matters against Qwest

Enclosed is a document that Eschelon filed with the AZ Commission on 9/8/03, listing pending and recently decided matters against Qwest



Pendingmatters.doc

Karen L. Clauson
Senior Director of Interconnection
Eschelon Telecom, Inc.
730 2nd Ave. South, Suite 1200
Minneapolis, MN 55402
Phone: 612-436-6026
Fax: 612-436-6126

PENDING/RECENTLY DECIDED MATTERS

-----Original Message-----

From: Clauson, Karen L
Sent: Tuesday, September 02, 2003 5 50 PM
To: 'TBERG@FCLAW com'
Subject: FW matters in other states/supplementing record

We have been told that Andy may be out of the office, so we are forwarding to you on behalf of Qwest

-----Original Message-----

From: Clauson, Karen L
Sent: Tuesday, September 02, 2003 5 38 PM
To: 'Crain, Andrew D'
Cc: Maureen Scott, dpozefsky@azruco.com; rhip@bellatlantic.net, hagoonb@bellsouth.net, MJR@CC STATE AZ US, RLB@CC STATE AZ US, thc@lrlaw.com, jsburke@omlaw.com, mpatten@rhd-law.com, jcrockett@swlaw.com, thomas f dixon@wcom.com, 'Wolters, Richard S (Rick) - LGCRP', 'Watkins, Gene'
Subject: matters in other states/supplementing record

Andy

Eschelon noticed the following exchange in the Transcript from the AZ 271 open meeting held on August 21, 2003:

Commissioner Mundell: "Are there matters pending in any other commissions in the other 13 states?" (Tr. p. 43, lines 17-19)

Mr. Crain: "We're well aware that that will continue in the future, and other than this DS1 issue, I don't know of anything else that has been filed with those commissions." (Tr. p. 44, lines 13-15)

Commissioner Mundell: "Once you have a chance to go back to your office and think about it, if you want to supplement your statement, that will be fine." (Tr. p. 44, lines 17-19)

As part of supplementing the record as to other matters pending in other commissions, perhaps Qwest would consider the following matters (Some enclosures/URLs are provided as a convenience, though Qwest should have complete info/status).

MN Docket No P-421/C-03-683 (Eschelon Complaint re. Qwest's Refusal to Honor Contractual and Legal Obligations)



Complaint MN
DMOQ.doc



Complaint --
Markert Aff -- 5-...

MN Docket No. P-421/C-03-627 (Eschelon Complaint re EEL issue and McLeod opt-in) [Letters of intent to file similar complaints have been filed in WA and CO. AZ complaint will also be filed soon.]



AGO_DOCS-#8967
00-v1-Eschelon_Q .



Qwest complaint
final.doc

WA Federal Court (Western District) Docket No. C03-1296R (Eschelon Complaint re access charges/missing access records in AZ, CO, MN, OR, UT, and WA, DSL, and failure to provide automatic conversion)



430082.2.doc

MN Docket No P421/C-02-1439 (McLeod/Prairie Wave Complaint Against Qwest for failure to pay Switched Access Charges)

<http://www.puc.state.mn.us/docs/orders/02-138.pdf>

MN Docket No P-421/C-03-616 (Eschelon Request for an Investigation Regarding Customer Conversion by Qwest and Regulatory Procedures)



03-0091.url



DrHaarltrApr1803.doc

Eschelon letter to Qwest regarding CO and MN outages/potential sabotage



TTaylor Outage
aug03.doc



Denver BDFB
Pics.ppt

MN Docket No. P421/C-03-1024 (Velocity Telephone Complaint against Qwest re. Qwest's Anti-Competitive Conduct - improperly failing to provision dark fiber, improperly refusing to provide interconnection, and improperly refusing to provide meet point transport at parity with Qwest's interoffice transport)

<http://www.puc.state.mn.us/docs/orders/03-0085.pdf>

MN Docket No. P-421/C-03-1024 (Desktop Media Complaint Against Qwest)

<http://www.puc.state.mn.us/docs/orders/03-0085.pdf>

OR Order Nos 03-462 & 03-269 (Metro One Telecom Complaint Against Qwest for breaching interconnection agreement; Commission found Qwest must provide access to UNEs at cost-based rates, including the UNE Directory Assistance listings (DAL))

<http://www.puc.state.or.us/orders/2003ords/03%2D462.pdf>

NE Nos FC-1296 & FC-1297 (Cox Nebraska Telecom, ALLTEL, Illuminet Against Qwest re. SS7)

ID Docket No QWE-T-02-11 (Idaho Telephone Association, Citizens, CenturyTel, Potlatch and Illuminet Complaint Against Qwest re. SS7)

<http://www.puc.state.id.us/fileroom/telecom/qwe-t-02-11/qwe-t-02-11.pdf>

IA Docket No. FCU-03-24 (U S. Cellular, Cox Iowa Telecom, and Illuminet Complaint Against Qwest re. SS7)

FCC, 8/4/03 Letter by Mountain Telecommunications to FCC Requesting involvement of Enforcement Bureau with resolution of dispute re SS7

MCI 8/26/03 Letter to AZ commission re OSS issues



tom's
stationery doc

Karen L. Clauson
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Minneapolis, MN 55402
Phone: 612-436-6026
Fax: 612-436-6126

-----Original Message-----

From: Clauson, Karen L.
Sent: Sunday, September 07, 2003 12:27 PM
To: 'ewoodcock@perkinscoie.com'
Subject: 2 additional matters

In addition to the matters listed in my earlier email, here are two more:

Multi-state arbitration & related court case regarding arbitration procedure (New Access Complaints regarding winback/wholesale pricing, credits, including MN finding relating to access/DUF files) (AAA arb No 77 Y 181 00316 VSS, CO Dist Ct. No 03-N-1278

SD Docket No T02-0389 (McLeod/Prairie Wave Complaint Against Qwest for failure to pay Switched Access Charges)

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Fax: 612-436-6126

-----Original Message-----

From: Clauson, Karen L.
Sent: Saturday, September 06, 2003 9:29 AM
To: 'ewoodcock@perkinscoie.com'
Cc: 'Maureen Scott', 'dpozefsky@azruco.com', 'rhip@bellatlantic.net', 'hagoodb@bellsouth.net', 'MJR@CC STATE AZ US', 'RLB@CC STATE AZ US', 'thc@lrlaw.com', 'jsburke@omlaw.com', 'mpatten@rhd-law.com', 'jcrockett@swlaw.com', 'thomas f dixon@wcom.com', 'Wolters, Richard S (Rick) - LGCRP', 'Watkins, Gene', 'TBERG@FCLAW.com'
Subject: FW: matters in other states/supplementing record

Beth

Mr. Berg has not responded to the emails below. We would appreciate it if you could provide a response.

-----Original Message-----

From: Clauson, Karen L.
Sent: Wednesday, September 03, 2003 4:32 PM

To: 'Crain, Andrew D', 'TBERG@FCLAW com'
Cc: 'Maureen Scott', 'dpozefsky@azruco com', 'rhip@bellatlantic net', 'hagoodb@bellsouth net',
'MJR@CC STATE AZ US', 'RLB@CC STATE AZ US', 'thc@irlaw com', 'jsburke@omlaw com',
'mpatten@rhd-law com', 'jrockett@swlaw com', 'thomas f dixon@wcom com', 'Wolters, Richard S
(Rick) - LGCRP', 'Watkins, Gene'
Subject: RE matters in other states/supplementing record

Andy/Tim

Are you supplementing the record with these (and any other) matters? It would be helpful to know before the open meeting on Friday. If you mail by regular mail, I may not get it before then, so was wondering if you could let me know. Thanks

**STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION**

**LeRoy Koppendraye
R. Marshall Johnson
Gregory Scott
Phyllis Reha
Ellen Gavin**

**Chair
Commissioner
Commissioner
Commissioner
Commissioner**

In the matter of the Complaint of Eschelon
Telecom of Minnesota, Inc. against Qwest
Corporation, formerly known as U S West
Communications, Inc

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Docket No P _____

**COMPLAINT AGAINST QWEST
CORPORATION, AND REQUEST
FOR EXPEDITED PROCEEDING
PURSUANT TO MINN. STAT. 237.462**

Eschelon Telecom of Minnesota, Inc ("Eschelon") hereby brings this Complaint, consisting of two separate issues, against Qwest Corporation ("Qwest") and alleges as follows:

INTRODUCTION AND PARTIES

1. Eschelon files this Complaint with the Minnesota Public Utilities Commission ("MPUC" or "Commission") in order to obtain immediate relief from the refusal of Qwest to honor its contractual and legal obligations to Eschelon, thereby injuring Eschelon, Minnesota consumers, and the development of a competitive telecommunications marketplace in Minnesota. Eschelon's Complaint alleges significant overcharges by Qwest for collocation non-recurring rates, and Qwest's withholding of DMOQ billing credits from Eschelon.

2. Specifically, Qwest overcharged Eschelon for non-recurring rates for 40 amp feeds and space preparation fees when Eschelon built its collocations in Minnesota in 1999 and 2000. Eschelon is due a refund of \$425,959, plus interest, from Qwest, which Qwest has refused to pay. In addition, Qwest has refused to provide Eschelon with all of the DMOQ billing credits due under the Parties' February 2000 Stipulation and Agreement and August 25, 1999 Interconnection Agreement. Eschelon is due \$105,048, plus interest, in DMOQ billing credits from Qwest related to UNE-E billing inaccuracies from March 2002 through December 2002.

3 Due to the continuous nature of Qwest's violations of law related to these issues, Eschelon requests that the Commission order an expedited hearing pursuant to Minn. Stat. § 237.462, Subd. 6

4 Eschelon requests such relief as may be just and reasonable and in accordance with applicable Minnesota and federal law, including, without limitation, the initiation of a complaint and investigation by the Commission pursuant to Minn Stat § 237.081, Subd. 1(a); the issuance of an administrative penalty order by the Commission pursuant to Minn Stat. § 237.462, Subds 1 and 2, the issuance of an Order requiring Qwest to refund \$425,959, plus interest, in collocation overcharges, the issuance of an Order requiring Qwest to refund \$105,048, plus interest, in DMOQ billing credits for March through December 2002; the issuance of an Order requiring Qwest to include in its DMOQ credit calculation for billing accuracy beginning in March 2002, and going forward, all UNE-E bills inaccurately billed at resale rates; and such other relief as the Commission deems appropriate.¹

5 Eschelon is a competitive local exchange carrier ("CLEC") providing local and interexchange telecommunications services in Qwest's service territory in Minnesota, primarily serving small business customers.

6 Eschelon's principal place of business is 730 Second Avenue South, Suite 1200, Minneapolis, Minnesota 55402 Eschelon is certified to provide local exchange service in Minnesota pursuant to Orders of the MPUC, dated July 18, 1996 and April 12, 1999.

7 Eschelon is represented in this proceeding by its attorney

Brent Vanderlinden, Attorney
Eschelon Telecom, Inc.
730 Second Avenue South, Suite 1200
Minneapolis, MN 55402-2456
Telephone: (612) 436-6287
Facsimile: (612) 436-6387

8 Respondent Qwest is a Colorado corporation, with offices in Minnesota at 200 South Fifth Street, Minneapolis, Minnesota 55402. Qwest is an incumbent local exchange carrier ("ILEC") within the meaning of Section 251(h) of the Telecommunications Act of 1996 (the "Act"), and provides local

¹ Eschelon also reserves its rights to such private remedies as may be available pursuant to Minnesota law and recognized in Minn. Stat. § 237.462, Subd. 11.

exchange, exchange access and inter-exchange services in Minnesota subject to the Commission's regulatory authority. Qwest is the dominant monopoly provider of local exchange service in Minnesota

9 Eschelon has served Qwest with this Complaint through:

Jason Topp, Senior Attorney
Qwest Communications
200 South Fifth Street, Suite 395
Minneapolis, Minnesota 55402
Telephone (612) 672-8904
Facsimile (612) 672-8911

Qwest Law Department
General Counsel
Inter-Connection
1801 California Street
51st Floor
Denver, Colorado 80202

Qwest Communications Director
Inter-Connection Compliance
1801 California St, Room 2410
Denver, Colorado 80202

JURISDICTION

The MPUC has jurisdiction over this Complaint pursuant to 47 U.S.C. § 252(e) (authority of state commissions to enforce interconnection agreements), Minn. Stat. §§ 237.081, Subd. 1(a) (investigations), 237.462, Subds. 1 and 6 (competitive enforcement), the Agreement for Local Wireline Network Interconnection and Service Resale between Eschelon and Qwest, § 11.1 and the Stipulation and Agreement of the parties, Section F.

FACTUAL BACKGROUND

A. ESCHELON IS ENTITLED TO A REFUND OF \$425,959, PLUS INTEREST, FROM QWEST FOR NON-RECURRING COLLOCATION OVERCHARGES IN 1999 AND 2000.

1 On or about October 4, 1999, the Commission approved an Agreement For Local Wireline Network Interconnection and Service Resale (the "Interconnection Agreement" or "Agreement") between Qwest and Eschelon. Relevant excerpts from a true and correct copy of the Interconnection Agreement and Amendments are attached as exhibits.²

2 The Parties' Interconnection Agreement provides that if the Parties cannot resolve a dispute they may apply to the Commission for resolution. Exhibit A-1, Part A, Section 11. The Agreement further provides that the Parties will seek expedited resolution by the Commission of any such dispute and

shall request that resolution occur in no event later than 60 days from the date of submission of the dispute to the Commission *Id*

3. The Agreement includes a table for "Physical and Virtual Collocation Prices" which states that "Rates are interim and subject to true up based on further Commission proceedings" Exhibit A-2.

4. On January 24, 2000, Qwest and Eschelon entered into the Second Amendment to their Interconnection Agreement. Exhibit A-3. The Amendment was filed with the Commission on January 27, 2000. The Amendment replaced the collocation terms and pricing in the Agreement with amended collocation terms and pricing. *Id*, page 1. The Amendment reiterated the "interim/subject to true up" nature of the collocation rates with the following language:

USW will recover MPUC approved Collocation costs through both recurring and nonrecurring charges. . . . All costs will be those costs and cost elements approved by the MPUC To the extent that a rate element or rate is not allowed under the current MPUC rulings or in any MPUC Cost Order, the MPUC's determination will govern.

Id, Section 6.1.

5. In 1999 and 2000, Eschelon completed 15 collocation build-outs, for which Qwest billed (and Eschelon paid) \$397,557 in non-recurring charges for 40 amp power delivery. Exhibit A-4. Qwest's charges were not based on Commission approved rates.

6. In its May 3, 1999, Order Resolving Cost Methodology, Requiring Compliance Filing, and Initiating Deaveraging Proceeding [Generic Cost Case], the Commission clearly stated that collocation

² All Exhibits are exhibits to the Affidavit of William D. Markert appended as Attachment 1 to this Complaint.

prices are to be set following the AT&T/MCI collocation cost model (CCM)³ Therefore, Qwest should have used the CCM to establish non-recurring charges for 40 amp power delivery. Had Qwest done so, Eschelon would have been billed only \$11,718 in non-recurring charges for 40 amp power delivery to its 15 collocation build-outs Exhibit A-4. Therefore, Eschelon is entitled to a refund from Qwest in the amount of \$385,839, plus interest *Id*

7 Four of Eschelon's fifteen collocation build-outs were cageless, for which Qwest billed (and Eschelon paid) \$41,804 in space preparation fees Exhibit A-5 Had Qwest's charges been based on Commission approved rates, Eschelon would have been billed only \$1,684. *Id* Therefore, Eschelon is entitled to a refund from Qwest in the amount of \$40,120, plus interest *Id*

8. In Docket No. P-421/C-01-1896, the Commission ordered Qwest to issue a refund of non-recurring collocation overcharges to Onvoy Inc , including 40 amp feeds and cageless collocation space preparation fees, plus 6% simple interest on the refund Eschelon is seeking a refund in this Complaint based on the same rationale that Onvoy was awarded a refund. Therefore, Eschelon requests 6% simple interest on its refunds

9. Eschelon detailed its refund request of non-recurring collocation overcharges for 40 amp feeds in a letter to Qwest, dated January 31, 2003. Exhibit A-4. On February 10, 2003, Eschelon reiterated this request to Patricia A Engels, Executive Vice President of Wholesale Markets for Qwest Exhibit A-6 Qwest denied the request in a letter from Ms Engels, dated April 1, 2003. Exhibit A-7. In a phone conversation between Eschelon and Qwest on April 4, 2003, Eschelon discussed Qwest's overcharges for cageless collocation space preparation fees, as had been ordered for by the MPUC for Onvoy To date, Qwest has not responded to or acted on these overcharges

10. Qwest denied Eschelon's refund requests for non-recurring collocation overcharges based on a settlement agreement⁴ between the parties, stating, "The settlement agreement between Qwest and Eschelon, dated April 2, 2001, settles fully all claims related to collocation non-recurring charges billed

³ The exceptions – Fiber Splicing, Essential AC Power; Essential AC Power Feed; and Composite Clock – which the Commission authorized US West to price using US West's cost model, in a later order issued on March 15, 2000, are inapplicable in this case.

⁴ The "Confidential Second Amendment to Confidential/Trade Secret Stipulation," attached hereto as Exhibit A-8, is now a public document.

prior to March 1, 2001 " Exhibit A-7 at 9 However, this statement is incorrect with respect to Eschelon's request for a refund of overcharges for 40 amp feeds and space preparation fees.⁵

11 The settlement resolved five categories of claims, the second of which addressed collocation charges Exhibit A-8 Eschelon agreed to release Qwest from.

any claims that [Eschelon] can or could have brought against Qwest related to the following (b) for all periods prior to March 1, 2001, true-ups pursuant to decisions of the Minnesota Public Utilities Commission in Minnesota docket number P-442, 5321, 3167, 466, 421/CI-96-1540, including for collocation and unbundled network elements .

Id at 1-2 This language limited the settlement's coverage to collocation components that were explicitly priced in the Generic Cost Case.

12 Non-recurring collocation charges for 40 amp feeds and space preparation fees were not priced in the Generic Cost Case In fact, in the Onvoy case, Qwest *expressly acknowledged* that non-recurring collocation charges for 40 amp feeds and space preparation fees were not priced in the Generic Cost Case. Exhibit A-9 at 8 ¶27, 10 ¶38 & fn 31, and 16 ¶62. Therefore, there is no legal or factual basis for Qwest's ongoing refusal to refund to Eschelon \$425,959, plus interest, for collocation overcharges

B. ESCHELON IS ENTITLED TO \$105,048, PLUS INTEREST, IN DMOQ BILLING CREDITS FROM QWEST FOR UNE-E BILLING INACCURACIES FROM MARCH 2002 THROUGH DECEMBER 2002.

1. The Interconnection Agreement sets forth certain Direct Measures of Quality (DMOQs) for Qwest service, together with credits or other remedies if Qwest fails to meet those DMOQs. These remedies call for, among other things, Overall Performance Index credits to Eschelon as set forth in Attachment 11, Appendix B of the Agreement. Exhibit B-1.

2. Qwest and Eschelon also entered into a Stipulation and Agreement (Stipulation) on or about February 29, 2000 Exhibit B-2. The Commission accepted the Stipulation and Agreement in an Order, dated June 28, 2000. The Stipulation, among other things, amended the DMOQ provisions of the Parties' Interconnection Agreement

3. The Stipulation provides for three metrics to be measured each month: (1) provisioning commitments met, (2) time to restore-out of service and (3) billing accuracy – adjustments for errors. Each

⁵ Eschelon agrees that its refund request for collocation non-recurring charges for 20 amp feeds was

of the three DMOQs is assigned a Performance Index Rating based on the level of compliance achieved by Qwest. The Performance Index Rating is then converted to a numerical value and an overall Performance Index is calculated on a monthly basis. Exhibit B-1 at 12-13, Exhibit B-2 at 3. If the overall Performance Index for the month is a negative number, this indicates that Qwest's overall performance for the month is less than the required objective, in which case the Performance Index is used as a percentage discount against the previous month's total bill from Qwest to determine the credit due to Eschelon. Exhibit B-2 at 3. The Stipulation requires Qwest to pay Eschelon's undisputed Overall Performance Credit claims within 30 days of submission by Eschelon.

4. Eschelon submitted claims to Qwest for performance billing credits for the months of March through June, 2002. Exhibit B-3. Qwest disputed each of these claims and refused to provide the credits claimed by Eschelon. After disputing these claims with Qwest for several months,⁶ with no success, Eschelon submitted claims to Qwest for performance billing credits for the remainder of 2002. Exhibit B-3. In response, Qwest agreed to provide Eschelon with \$52,702 in undisputed DMOQ credits, but refused to include an entire category of billing errors in this calculation, namely UNE-Eschelon ("UNE-E") bill credits. Exhibit B-5. The amount of DMOQ credits withheld by Qwest from March 2002 through December 2002 totals \$105,048. Exhibit B-3.

5. The primary dispute concerns metric B-4, "Billing Accuracy-Adjustments for Errors". Under this metric the parties have agreed to divide the total revenue billed without error by the total billed revenue billed in the reporting period (month). Qwest has refused to provide DMOQ credits for UNE-E billing inaccuracies.

6. UNE-E is a product Qwest provides to Eschelon pursuant to the Eighth Amendment to the Parties' Interconnection Agreement (Amendment) entered into on or about December 4, 2000. Exhibit B-6. The Commission approved this Amendment in an Order, dated January 26, 2001. Pursuant to this Amendment, Qwest agreed to provide Eschelon with a platform product that Qwest initially referred to as

resolved in the settlement agreement

⁶ The parties' exchange of correspondence concerning DMOQ credits is attached as Exhibit B-4.

UNE-Eschelon or UNE-E (and Qwest now refers to as UNE-Star). Eschelon purchased UNE-E as a substitute for UNE-Platform ("UNE-P"), Qwest's official platform product⁷

7. Qwest agreed to convert Eschelon's resale base to UNE-E but indicated it could not complete the conversion for a few months. In the short-term, Qwest told Eschelon to order UNE-E through the existing resale process. Under this temporary process, Qwest stated it would continue to bill Eschelon the resale rate and then compare the end-of-month billed revenues to the UNE-E rates and pay Eschelon the difference. Qwest continues to use this temporary process today – over two years after the UNE-E Amendment date – despite Qwest's promises to develop a billing system to accurately bill Eschelon for UNE-E lines.

8. Qwest's continued billing for UNE-E at the incorrect resale rate has resulted in Eschelon receiving inaccurate UNE-E bills each month and being required to expend a large amount of resources attempting to reconcile the bills with what should have been billed by Qwest. For each month in question, March 2002 through December 2002, Qwest has presented Eschelon with UNE-E bills that do not reflect any of the UNE-E rates in the UNE-E Interconnection Agreement Amendment.⁸ Instead, the bills show rates that reflect the retail rate minus the wholesale discount. A UNE-E credit must then be determined by applying the UNE-E rates to the UNE-E product quantities Eschelon has ordered.

9. Because the bills from Qwest reflect resale rates, rather than UNE-E rates, literally 100% of Qwest's UNE-E bills to Eschelon were inaccurate in 2002. This particular concern was raised by Eschelon in two recent regulatory proceedings. In the Minnesota Public Utilities Commission's investigation of Qwest's 271 filing, the Administrative Law Judge found "conclusively that UNE-Star does not meet the standards for a UNE-P offering (particularly with respect to billing accuracy . . .)." MN PUC Docket No. P-421/CI-01-1371, ALJ's Report at 35, ¶ 100. Exhibit B-3. Likewise, in the Arizona Commerce Commission's investigation of Qwest's 271 filing, the ACC staff recommended that "Until the

⁷ When Eschelon initially attempted to order UNE-P from Qwest in Minnesota, the product had numerous problems. When Eschelon placed trial orders, the orders resulted in denial and loss of features, unclear and changing processes and customer-affecting service problems. The problems were so severe that Eschelon could not utilize the product. In response to these problems, Qwest offered Eschelon a different product it called UNE-E.

⁸ Bills for months prior to March 2002 contained this same error. However, Eschelon had entered into an agreement with Qwest to forego DMOQ sums due for those months.

issue with embedded accounts is resolved, Qwest should be required to count [UNE-E billing] as an error or an inaccurate bill for purposes of calculating its billing measurements ACC Docket No T-00000A-97-0238, Staff Report at 47, ¶ 216 Exhibit B-3

10. Despite the fact Qwest admits its UNE-E bills to Eschelon are inaccurate, it refuses to include these bills in the billing accuracy metric agreed upon by the parties Qwest alleges that “Qwest and Eschelon have agreed upon the process for the migration of accounts over to UNE-P and were fully aware of the timeframe for the conversion process ” Letter from Vicki Keller to David Frame, dated August 20, 2002. Exhibit B-4 Qwest has stated that it will not include UNE-E billing inaccuracies in the DMOQ credit calculation because it does not believe the UNE-E rate is being billed in error *Id* Qwest stated on November 14, 2002, and reiterated on April 1, 2003, that “Qwest will litigate this issue if necessary ” Exhibit B-4, Exhibit A-7 at 10.

11 Qwest has a duty to provide Eschelon with accurate UNE-E bills, regardless of whether UNE-E lines are eventually converted to UNE-P lines. The UNE-E Amendment expressly provides that it “may not be further amended or altered except by written instrument executed by an authorized representative of both Parties ” Exhibit B-6 at 2 ¶1.8 The UNE-E Amendment also expressly provides that, except as modified by the amendment, the underlying interconnection agreement “shall remain in full force and effect ” *Id* The UNE-E Amendment does not modify the billing provisions of the underlying agreement, which require Qwest to accurately bill Eschelon for charges that Eschelon incurs as a result of purchasing products and services from Qwest Exhibit B-1 at ¶12. The parties have not entered into a subsequent amendment that modifies the billing provisions of the underlying agreement, which require Qwest to accurately bill Eschelon for charges that Eschelon incurs as a result of purchasing products and services from Qwest Therefore, Qwest’s past and on-going UNE-E billing inaccuracies are justly addressed through the payment of DMOQ credits to Eschelon.

C. ESCHELON HAS ATTEMPTED TO RESOLVE THESE ISSUES BEFORE BRINGING THIS MATTER TO THE COMMISSION.

1. As has been demonstrated above, Eschelon has initiated numerous contacts with Qwest in an attempt to address the issues raised in this Complaint

2 In a February 10, 2003, letter from Eschelon President Richard Smith to Patricia A. Engels, Executive Vice President of Wholesale Markets for Qwest, Eschelon reiterated its requests for the collocation refund and DMOQ credits Exhibit A-6. Qwest denied Eschelon's requests on April 1, 2003. Exhibit A-7.

QWEST'S CONTINUING VIOLATIONS OF LAW

Qwest's refusal to refund collocation overcharges and DMOQ credits causes significant harm to Eschelon and its customers and injures the development of a competitive marketplace for telecommunication services in Minnesota. Qwest benefits by charging and retaining higher rates than it is entitled to. Qwest also benefits to the extent that the marketing efforts of Eschelon are impeded due to Qwest unreasonably withholding these refunds and credits from Eschelon.

Qwest's actions with regard to Eschelon, as detailed above, constitute continuing breaches of the Interconnection Agreement approved by this Commission and continuing violations of state and federal law.

As demonstrated above, Qwest has breached its Interconnection Agreement with Eschelon and state and federal law. Qwest's continuing breaches of the Interconnection Agreement violates Minn. Stat. § 237.121(a)(4) which prohibits Qwest from refusing to provide a service, product, or facility in accordance with its contracts and the MPUC's rules and orders. Qwest's breaches of the Interconnection Agreement violate federal law, which requires Qwest to provide interconnection on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms of its Interconnection Agreement. 47 U.S.C. §§ 251(c)(2)(C), (D).

Notwithstanding the conduct of Qwest described above, Eschelon has fully and in good faith performed all of its duties and obligations under the Interconnection Agreement, the Act and applicable state law.

REQUEST FOR EXPEDITED HEARING

1 The Interconnection Agreement between Qwest and Eschelon recognizes the Commission's continuing jurisdiction to implement and enforce all of the terms and conditions of the Agreement. Exhibit A-1 at 14, ¶11.1. Further, the Agreement provides that any dispute arising out of or relating to the Agreement that the Parties themselves cannot resolve, may be submitted to the Commission for resolution. *Id.* The Agreement further provides that the Parties agree to seek expedited resolution by

the Commission of any such dispute and shall request that resolution occur in no event later than 60 days from the date of submission of the dispute to the Commission. *Id*

2 The Interconnection Agreement provisions in this regard are consistent with Minn Stat § 237.462, Subd. 6. That statute provides that the Commission may order an expedited proceeding if the Commission finds it to be in the public interest. In making this determination, the Commission may consider “any evidence of impairment of the provision of telecommunication service subscribers in the state or impairment of the provision of any service or network element.” *Id*

3 Both under the terms of the Interconnection Agreement and Minnesota Statutes, the Commission should grant an expedited proceeding in this matter. The problems detailed in this Complaint continue without abatement, with significant harm to Eschelon. In particular, the DMOQs should act as an incentive to Qwest to provide accurate bills as required by the Parties’ Interconnection Agreement. But, if Qwest can provide inaccurate bills with no consequence under the DMOQs, it is unlikely to fix this billing problem or future billing problems. Meanwhile, Eschelon continues to receive inaccurate bills that require significant resources to reconcile each month and always remain an estimate of what is actually due

RELIEF REQUESTED

WHEREFORE, Eschelon respectfully requests that the Commission.

- 1 Investigate the issues raised in this Complaint pursuant to Minn Stat. § 237.081, Subd. 1,
- 2 Resolve this matter within 60 days in an expedited proceeding, pursuant to the terms of the Interconnection Agreement and Minn Stat. § 237.462, Subd. 6,
- 3 Declare that the actions of Qwest detailed above constitute repeated and continuing violations of its Interconnection Agreement with Eschelon,
- 4 Order Qwest to immediately refund to Eschelon the overcharges for collocation non-recurring 40 amp feeds and space preparation fees, with interest;
- 5 Order that Qwest include in its DMOQ credit calculation for billing accuracy beginning in March 2002, and going forward, all UNE-E bills inaccurately billed at resale rates, as required by the Parties’ Stipulation and Interconnection Agreement;
- 6 Order Qwest to immediately credit to Eschelon all amounts due for DMOQ credits for the months of March 2002 through the present, with interest,

7. Grant Eschelon any and all relief to which it is entitled under the Interconnection Agreement for Qwest's breaches of contract,
8. Assess administrative penalties against Qwest for its repeated and continuing violations of state and federal law and the Interconnection Agreement, as authorized by Minn Stat § 237 462, Subd. 1, and
- 9 Grant Eschelon such other and further relief as the Commission deems appropriate

Dated May 2, 2003

Respectfully submitted,

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STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
R. Marshall Johnson
Gregory Scott
Phyllis Reha
Ellen Gavin

Chair
Commissioner
Commissioner
Commissioner
Commissioner

Eschelon Telecom of Minnesota, Inc.

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Docket No. P _____

Complainant,

)

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vs.

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)

AFFIDAVIT OF
WILLIAM D. MARKERT

Qwest Corporation,

)

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Respondent.

)

)

)

STATE OF MINNESOTA)

) ss.

COUNTY OF HENNEPIN)

1. I, William D. Markert, being duly sworn, state that I am the Vice President-Network Financial Management for Eschelon Telecom, Inc. (Eschelon).
2. Eschelon and Qwest are parties to an Interconnection Agreement. Attached as Exhibit A-1 is a true and correct copy of excerpts from the Parties' Agreement for Local Wireline Network Interconnection and Service Resale (Interconnection Agreement or Agreement).
3. The Parties' Interconnection Agreement provides that if the Parties cannot resolve a dispute they may apply to the Commission for resolution. The Agreement further provides that the Parties will seek expedited resolution by the Commission of any such dispute and shall request that resolution occur in no event later than 60 days from the date of submission of the dispute to the Commission.
4. The Agreement includes a table for "Physical and Virtual Collocation Prices" which states that "Rates are interim and subject to true up based on further Commission proceedings." Attached as Exhibit A-2 is a true and correct copy of the table.

5. On January 24, 2000, Qwest and Echelon entered into the Second Amendment to their Interconnection Agreement. Attached as Exhibit A-3 is a true and correct copy of the Amendment. The Amendment was filed with the Commission on January 27, 2000.

6. In 1999 and 2000, Eschelon completed 15 collocation build-outs, for which Qwest billed (and Eschelon paid) approximately \$397,557 in non-recurring charges for 40 amp power delivery. Attached as Exhibit A-4 is a true and correct copy of my letter to Jean Novak, dated January 31, 2003, detailing these charges. Qwest's charges were not based on Commission approved rates.
7. Qwest should have used the CCM to establish non-recurring charges for 40 amp power delivery. Had Qwest done so, Eschelon would have been billed approximately \$11,718 in non-recurring charges for 40 amp power delivery to its 15 collocation build-outs. Therefore, Eschelon is entitled to a refund from Qwest in the amount of \$385,839, plus interest.
8. Four of Eschelon's fifteen collocation build-outs were cageless, for which Qwest billed (and Eschelon paid) approximately \$41,804 in space preparation fees. Attached as Exhibit A-5 is a true and correct copy of my spreadsheet detailing these charges. Had Qwest's charges been based on Commission approved rates, Eschelon would have been billed approximately \$1,684. Therefore, Eschelon is entitled to a refund from Qwest in the amount of \$40,120, plus interest.
9. Eschelon detailed its refund request of non-recurring collocation overcharges for 40 amp feeds in a letter to Qwest, dated January 31, 2003. Attached as Exhibit A-4. On February 10, 2003, Eschelon reiterated this request to Patricia A. Engels, Executive Vice President of Wholesale Markets for Qwest. Attached as Exhibit A-6 is a true and correct copy of that letter. Qwest denied the request in a letter from Ms. Engels, dated April 1, 2003. Attached as Exhibit A-7 is a true and correct copy of that letter.
10. In a phone conversation between Eschelon and Qwest on April 4, 2003, Eschelon discussed Qwest's overcharges for cageless collocation space preparation fees, as had been ordered for by the MPUC for Onvoy. To date, Qwest has not responded to or acted on these overcharges.
11. Attached as Exhibit A-8 is a true and correct copy of the "Confidential Second Amendment to Confidential/Trade Secret Stipulation" between Qwest and Eschelon, which is now a public document.
12. Attached as Exhibit A-9 is a true and correct copy of relevant portions of the ALJ's Report in the Onvoy case, MPUC Docket No. P-421/C-01-1896.
13. The Interconnection Agreement sets forth certain Direct Measures of Quality (DMOQs) for Qwest service, together with credits or other remedies if Qwest fails to meet those DMOQs. These remedies call for,

among other things, Overall Performance Index credits to Eschelon as set forth in Attachment 11, Appendix B of the Agreement. Attached as Exhibit B-1 is a true and correct copy of relevant portions of the Agreement

14. Qwest and Eschelon also entered into a Stipulation and Agreement (Stipulation) on or about February 29, 2000. Attached as Exhibit B-2 is a true and correct copy of the Stipulation. The Commission accepted the Stipulation and Agreement in an Order, dated June 28, 2000. The Stipulation, among other things, amended the DMOQ provisions of the Parties' Interconnection Agreement.
15. Eschelon submitted claims to Qwest for DMOQ credits for the months of March through June, 2002. Attached as Exhibit B-3 is a true and correct copy of my letter (including attachments) to Jean Novak, dated March 13, 2003, detailing Eschelon's DMOQ credit requests from March 2002 through December 2002. Qwest disputed each of these claims and refused to provide the credits claimed by Eschelon.
16. Attached as Exhibit B-4 is a true and correct copy of Qwest's and Eschelon's exchange of correspondence concerning DMOQ credits.
17. Qwest agreed to provide Eschelon with \$52,702 in undisputed DMOQ credits, but refused to include DMOQ credits related to UNE-Eschelon ("UNE-E") billing errors. Attached as Exhibit B-5 is a true and correct copy of Qwest's March 28, 2003 letter (including attachments) detailing the DMOQ credits provided. The amount of DMOQ credits withheld by Qwest from March 2002 through December 2002 totals approximately \$105,048.
18. The primary dispute between Eschelon and Qwest regarding DMOQ credits concerns metric B-4, "Billing Accuracy-Adjustments for Errors". Under this metric the parties have agreed to divide the total revenue billed without error by the total billed revenue billed in the reporting period (month). Qwest has refused to provide DMOQ credits for UNE-E billing inaccuracies.
19. UNE-E is a product Qwest provides to Eschelon pursuant to the Eighth Amendment to the Parties' Interconnection Agreement (Amendment) entered into on or about December 4, 2000. Attached as Exhibit B-6 is a true and correct copy of this Amendment. The Commission approved this Amendment in an Order, dated January 26, 2001. Pursuant to this Amendment, Qwest agreed to provide Eschelon with a platform product that Qwest initially referred to as UNE-Eschelon or UNE-E (and Qwest now refers to as UNE-Star). Eschelon purchased UNE-E as a substitute for UNE-Platform ("UNE-P"), Qwest's official platform product.
20. When Eschelon initially attempted to order UNE-P from Qwest in Minnesota, the product had numerous problems. When Eschelon placed trial orders, the orders resulted in denial and loss of features, unclear and

changing processes and customer-affecting service problems. The problems were so severe that Eschelon could not utilize the product. In response to these problems, Qwest offered Eschelon a different product it called UNE-E.

21. Qwest agreed to convert Eschelon's resale base to UNE-E but indicated it could not complete the conversion for a few months. In the short-term, Qwest told Eschelon to order UNE-E through the existing resale process. Under this temporary process, Qwest stated it would continue to bill Eschelon the resale rate and then compare the end-of-month billed revenues to the UNE-E rates and pay Eschelon the difference. Qwest continues to use this temporary process today – over two years after the UNE-E Amendment date – despite Qwest's promises to develop a billing system to accurately bill Eschelon for UNE-E lines.
22. Qwest's continued billing for UNE-E at the incorrect resale rate has resulted in Eschelon receiving inaccurate UNE-E bills each month and being required to expend a large amount of resources attempting to reconcile the bills with what should have been billed by Qwest. For each month in question, March 2002 through December 2002, Qwest has presented Eschelon with UNE-E bills that do not reflect any of the UNE-E rates in the UNE-E Interconnection Agreement Amendment. Instead, the bills show rates that reflect the retail rate minus the wholesale discount. A UNE-E credit must then be determined by applying the UNE-E rates to the UNE-E product quantities Eschelon has ordered. Because the bills from Qwest reflect resale rates, rather than UNE-E rates, literally 100% of Qwest's UNE-E bills to Eschelon were inaccurate in 2002.

FURTHER AFFIANT SAYETH NOT.

Dated: May 2, 2003.

William D. Markert

Subscribed and sworn to before me
this _____ day of May 2003.

Notary Public